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CITATIONS

Cases:

372-831—70——1

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 300

JAMES TOOAHIMPAH TATE, ET AL., PETITIONERS
v.
WALTER J. HICKEL, SECRETARY OF THE INTERIOR, AND DORITA HIGH HORSE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE SECRETARY

OPINIONS BELOW

The opinion of the court of appeals (App. 44–47) is reported at 407 F. 2d 394. The opinion of the district court (App. 27–37) is reported at 277 F. Supp. 464. The administrative decision, which became the final order of the Secretary of the Interior (App. 82–87), is not reported.

JURISDICTION

The judgment of the court of appeals was filed on March 3, 1969 (App. 49), and a petition for rehearing was denied on April 8, 1969 (App. 62). The petition

for a writ of certiorari was filed on June 30, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Secretary of the Interior's disapproval of a will disposing of restricted Indian allotments is "final and conclusive" as stated in 25 U.S.C. 372.

2. Whether 25 U.S.C. 373 authorizes the Secretary to take equitable considerations into account in disapproving such a will.

STATUTE INVOLVED

The Act of June 25, 1910, 36 Stat. 855, as amended, 25 U.S.C. 372, 373, provides: [1]

> SEC. 1. When any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be *final and conclusive*. If the Secretary of the Interior decides the heir or heirs of such decedent competent to manage their own affairs, he shall issue to such heir or heirs a patent in fee for the allotment of such decedent; if he shall decide one or more of the heirs to be incompetent, he may in his discretion, cause such lands to be sold: * * *. [Emphasis supplied.]

[1] The Act is presented here, and referred to hereafter, in its current amended form, as it existed when the issues in this case arose. The amendments to the Act are not significant as regards the issues presented in this case.

SEC. 2. Any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: *Provided, however,* That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior: *Provided further,* That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator, and in case where a will has been approved and it is subsequently discovered that there has been fraud in connection with the execution or procurement of the will the Secretary of the Interior is authorized within one year after the death of the testator to cancel the approval of the will, and the property of the testator shall thereupon descend or be distributed in accordance with the laws of the State wherein the property is located: *Provided further,* That the approval of the will and the death of the testator shall not operate to terminate the trust or restrictive period, but the Secretary of the Interior may, in his discretion, cause the lands to be sold and the money derived therefrom, or so much thereof as may be necessary, used for the benefit of the heir or heirs entitled thereto, remove the restrictions, or cause patent in fee to

be issued to the devisee or devisees, and pay the moneys to the legatee or legatees either in whole or in part from time to time as he may deem advisable, or use it for their benefit: *Provided also,* That this section and section 372 of this title shall not apply to the Five Civilized Tribes or the Osage Indians.

STATEMENT

George Chahsenah, a Comanche Indian, died leaving a restricted estate consisting of interests in three Comanche allotments (App. 72). Under a will dated March 14, 1963, George Chahsenah devised and bequeathed his estate to a niece and her three children, petitioners herein (App. 72). The will made no mention of the decedent's daughter, Dorita High Horse (App. 83).

Dorita High Horse and others contested the testamentary capacity of the decedent because of his history of prolonged excessive drinking (App. 71–75). After hearing conflicting evidence, the Bureau of Indian Affairs' hearing examiner approved the will, finding that the decedent was mentally competent when the will was made (App. 74–75). The examiner also found that Dorita High Horse was the illegitimate daughter of the decedent (App. 71). In departmental proceeding, that approval was rescinded and the will disapproved (App. 82–87). The Regional Solicitor, acting for the Secretary, found that the decedent had failed to discharge his responsibilities to his daughter during her childhood and that it would be "inappropriate that the Secretary perpetuate this utter disregard for the daughter's welfare by lending his approval to the decedent's will" (App. 86). Petitioners

then commenced this action, seeking to have the Secretary's decision set aside and the estate distributed in accordance with the terms of the will (App. 5). The judgment of the district court ordering the Secretary to approve the will (App. 38–39), was reversed by the court of appeals, with directions to dismiss for lack of jurisdiction on the ground that, under Section 2 of the 1910 Act, *supra*, the departmental decision was not subject to judicial re-examination (App. 44–47).

SUMMARY OF ARGUMENT

I. The Act of June 25, 1910, precludes review of the Secretary's approval or disapproval of a will disposing of allotted lands. The language of Section 1 of the Act, which explicitly states that the Secretary's determination as to the heirs of an intestate allottee is "final and conclusive," must be read as applicable to Section 2, which authorizes the Secretary to approve wills. This reading is compelled by the parallel provisions and close relationship between these two complementary provisions, and by the anomalous situations which could result if the same finding by the Secretary were reviewable with respect to Section 1 but not with respect to Section 2. The legislative history of the Act makes it clear that Congress thought it was authorizing the Secretary to make final, non-reviewable decisions under both Sections 1 and 2. This Court has already held that constitutional standards do not require that Congress provide review of the Secretary's determinations in this area.

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II. Even if the Act had not precluded review of the Secretary's disapproval of a will, the Secretary's decision in this case could only be reversed if it were found that the Secretary acted beyond the scope of his authority. Petitioners' contention that the Secretary exceeded his authority by taking into account equitable considerations is erroneous. The legislative history of the Act shows that Congress intended the Secretary to decide whether a will equitably disposes of restricted property, and this duty is entirely consistent with the Secretary's fiduciary role with respect to restricted Indian allotments.

ARGUMENT

I. THE 1910 ACT PRECLUDES REVIEW OF THE SECRETARY'S REFUSAL TO APPROVE A WILL DISPOSING OF ALLOTTED LANDS

The decision below rests, in part, upon the explicit authority and responsibility of the Secretary of the Interior to supervise the disposition of restricted Indian property (allotments) upon the death of the Indian allottees, pursuant to the Act of June 25, 1910, 36 Stat. 855, as amended, 25 U.S.C. 372, 373.[2] Section

[2] "An Act to provide for determining the heirs of deceased Indians, for the disposition and sale of allotments of deceased Indians, for the leasing of allotments, and for other purposes." Prior to the passage of the Act of August 15, 1894, 28 Stat. 286, the sole authority for settling disputes concerning allotments, including those regarding inheritance, rested with the Secretary of the the Interior. *McKay* v. *Kalyton*, 204 U.S. 458, 468. The 1910 Act restored to the Secretary the power to determine legal heirs, which had been taken from him by the 1894 Act and the Act of February 6, 1901, 31 Stat. 760. *Hallowell* v. *Commons*, 239 U.S. 506, 508.

1 of the Act authorizes the Secretary to "ascertain the legal heirs" of an Indian decedent who dies intestate, and specifies that the Secretary's "decision thereon shall be final and conclusive." This Court has recognized as settled that the courts are without jurisdiction to review the Secretary's decisions as to heirs, even when a misapplication of law is alleged. *First Moon* v. *White Tail,* 270 U.S. 243, 244.[3] In interpreting Section 1 of the Act to preclude judicial review of the Secretary's determination of the legal heirs of an allottee, the Court said (270 U.S. at 244):

> The legislative history of the Act of 1910—Cong. Rec. vol. 45, p. 5811—lends support to this construction; and abundant reason for the provision becomes apparent upon consideration of the infinite difficulties which otherwise would arise in connection with the sundry duties of the Secretary of the Interior relative to Indian allotments.

Section 2 of the Act, 25 U.S.C. 373—directly involved here—complements Section 1 by providing that an allottee may dispose of his restricted property by will if such will is approved by the Secretary. The court below held, on the basis of its previous decisions in *Heffelman* v. *Udall,* 378 F. 2d 109, 112, certiorari

[3] This Court has always limited review of the Secretary's decisions affecting other aspects of restricted Indian property. *United States* v. *U.S. Fidelity Co.*, 309 U.S. 506; *United States* v. *Shaw*, 309 U.S. 495; *Morrison* v. *Work*, 266 U.S. 481; *United States* v. *Sherwood*, 312 U.S. 584. See also: *Arenas* v. *United States*, 197 F. 2d 418, 420 (C.A. 9); *Red Hawk* v. *Wilbur*, 39 F. 2d 293 (C.A. D.C.)

denied, 389 U.S. 926, and *Attocknie* v. *Udall,* 390 F. 2d 636, certiorari denied, 393 U.S. 833, that Sections 1 and 2 of the Act must be read in concert, and that the express finality in Section 1, precluding review of the Secretary's determinations of heirship, was applicable to the Secretary's decision in this case, under Section 2, to disapprove a will which disposed of restricted property. The court held that "such a determination comes within the jurisdictional exception stated in section 10 of the Administrative Procedure Act," which precludes judicial review of agency determinations where Congress has specified that such determinations are final.

The position taken by the Tenth Circuit in this case has considerable support in the decided cases. In 1921, this court recognized the complete control Congress had vested in the Secretary for "the administration of the allotment and of all that is connected with or made necessary by it * * *." *Blanset* v. *Cardin,* 256 U.S. 319, 326. *Nimrod* v. *Jandron,* 24 F. 2d 613 (C.A. D.C.) recognized the courts' lack of jurisdiction to prevent the Secretary from reconsidering his previous approval of a will. *Hanson* v. *Hoffman,* 113 F. 2d 780, 790 (C.A. 10), while resolving a dispute as to Indian-owned property, carefully excepted restricted allotments from its decision, and the Tenth Circuit has consistently held that the Secretary's discretion in the area of restricted property is absolute. *Heffelman* v. *Udall, supra; Attocknie* v. *Udall, supra.* Only the District of Columbia Circuit has refused to consider Sections 1 and 2 together, and has held that determinations under Section 2 are subject to a narrow

scope of review. *Homovich* v. *Chapman,* 191 F. 2d 761.

The view that Section 2 of the Act precludes review of the Secretary's discretionary decisions in the in the same manner as does Section 1 is, we submit, correct. Sections 1 and 2 of the Act, taken together, provide a complete enumeration of the Secretary's supervisory powers over the inheritance of allotted lands. The parallel provisions of these two sections strongly evidences the close ties between them. Both empower the Secretary "in his discretion" to sell the restricted lands and both sections authorize the Secretary to remove restrictions and to issue fee patents to heirs and devisees. The Secretary's role under both of these sections is managerial and supervisory in character, and requires the exercise of discretion. In keeping with the Secretary's fiduciary responsibility to administer allotted lands, both these sections require that the Secretary approve any and all changes in beneficial ownership of a deceased Indian's restricted land. Logic dictates that the Congress intended for the Secretary to have the same scope of authority with respect to approving wills under Section 2 as he does with respect to determining heirs under Section 1. Indeed, it would seem to follow *a fortiori* that the Secretary's discretion to approve a will should be no less than his discretion to determine heirs. In the former case, the Secretary merely decides whether allotted property passes by one method of inheritance or another, while in the latter case the Secretary's determinations result in the selection of specific recipients of allotted property.

The absurd situation which could result if Sections

1 and 2 are not read together is illustrated by the case of *Hayes* v. *Seaton,* 270 F. 2d 319 (C.A. D.C.). In that case, the Secretary was called upon to decide whether a deceased Indian's son and legatee had survived his father (who left a will), the son (who died intestate) having disappeared one year before the father's death. The majority opinion characterized that decision as a determination of the son's legal heirs, under Section 1. Chief Justice Burger, then Circuit Judge, argued persuasively in his dissent that both Sections 1 and 2 were applicable to that determination. In line with the prior holdings of the District of Columbia Circuit referred to above, Judge Burger felt that Section 2 determinations were reviewable. Yet, an anomalous result might have occurred if that position had prevailed. In the *Hayes* situation, the Secretary's decision, that the son survived the father, was crucial to the disposition of property to the son's heirs (Section 1). If Sections 1 and 2 are not read together, the same decision could have been reviewable in the former context and not reviewable in the latter. Indeed, it is not difficult to imagine that many situations could arise in which the same determination by the Secretary could control questions arising under both Sections 1 and 2 of the Act. Obviously, the scope of the Secretary's discretion in such a situation must be uniform.

It is significant that Congress thought that it was giving the Secretary absolute discretion to make decisions affecting the distribution of restricted estates under both Sections 1 and 2 of the 1910 Act. This is evidenced by the debate found at 45 Cong. Rec. 5812,

61st Cong., 2d Sess. (May 4, 1910). The Court referred to this debate in *First Moon* v. *White Tail, supra,* in which the Court upheld the finality of the Secretary's decisions under Section 1.

> Mr. Cox of Indiana. Mr. Chairman, what is the gentleman's opinion as to whether or not the proviso contained in section 2 does not place the complete power of the will in the hands of the Commissioner of Indian Affairs?
>
> Mr. BURKE of South Dakota. The Commissioner of Indian Affairs and the Secretary of the Interior, of course, would not favor the provision permitting Indians to make wills unless the making of them were subject to the approval of the Department.
>
> Mr. Cox of Indiana. *Under the proviso as it now exists in section 2, does it not place complete power in the hands of the Secretary of the Interior and the Commissioner of Indian Affairs over the will of an Indian with absolute power to revoke the Indian's will?*
>
> Mr. BURKE of South Dakota. *I think so.*
>
> Mr. Cox of Indiana. Then after all it simply imposes the entire power of making the will in the hands of the Commissioner of Indian Affairs.
>
> Mr. BURKE of South Dakota. I will say the purpose was this: It frequently happened—and I will speak of that in connection with sections 3 and 4 at the same time—it frequently happened an Indian has three or four children. He was allotted land at the time he had only two children, and the father and the mother have allotments and the two children who were living at the time allotments were made have allot-

ments, but the other children have no land at all.

Now, the Indian is just as human as a white man, and it frequently happens that he desires to have permission to give his allotment to the children who have no land, and in a case of that kind undoubtedly the Interior Department would O.K. it, whereas if it was a will giving his estate to some person who ought not to have it, then they would disapprove it.

Mr. Cox of Indiana. I suppose the purpose of this proviso is *an equitable purpose,* reserving in the Department of the Interior the power to compel the Indian to make a proper will—

Mr. BURKE of South Dakota. Not compel him at all.

Mr. Cox of Indiana. Or else revoke the will if he did not make a proper will.

Mr. BURKE of South Dakota. *If the Indian makes a will, and it is not satisfactory to the commissioner and the Secretary, and I put both in to safeguard it, it will be disapproved of, and of course will be of no effect.*

Mr. Cox of Indiana. Then, if the will does not meet the approval of the Commissioner of Indian Affairs and the Secretary of the Interior, it gives them power to revoke it.

Mr. BURKE of South Dakota. No; it can not be revoked until approved, at least. * * * [Emphasis supplied.]

Petitioners' reliance on *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, is misplaced. In *Abbott,* this Court held that judicial review of an administrative determination should not be precluded unless there is "clear and convincing evidence" of a contrary legislative intent. See also *Rusk* v. *Cort,* 369

U.S. 367, 379–380. Nothing in the language or legislative history of the Food, Drug, and Cosmetic Act indicated whether the courts had jurisdiction to review the administrative determinations under consideration in that case; accordingly, the Court applied its presumption that the agency findings were reviewable. Neither *Abbott* nor any of the cases preceding it control a case, such as this one, in which the language of the statute, the necessary uniformity of the Secretary's discretionary authority, and the legislative history provide "clear and convincing evidence" of a Congressional intent to preclude review. To the contrary, these cases make it clear that where the requisite evidence of such an intent is present, the courts must abide by Congress' decision and decline to take jurisdiction.

Nor does this case present the constitutional problems which this Court faced in *Estep* v. *United States*, 327 U.S. 114. In that case, a sharply divided court held that a defendant in a criminal prosecution under the Selective Training and Service Act of 1940 for willful failure and refusal to submit to induction, could raise the defense that the action of his local board in rejecting his claim for conscientious objector status was beyond its jurisdiction. The Court held that the language of the Selective Training and Service Act must be read to allow a court in a criminal proceeding to review, within a very narrow range, the draft board's findings, even though the language of the Act gave some indication that the local board's orders would be final. The Court's opinion was clearly designed to avoid the constitutional problem of allow-

ing a person to be "criminally punished without ever being accorded the opportunity to prove that the prosecution is based upon an invalid administrative order" (concurring opinion of Murphy, J., at 327 U.S. 125). Indeed, Mr. Justice Douglas, delivering the opinion of the Court, expressly recognized that "except when the Constitution requires it, judicial review of administrative action may be granted or withheld as Congress chooses." 327 U.S. at 120.

The statutory provision under consideration in this case authorizes the Secretary of the Interior, acting in his fiduciary capacity as trustee for Indian allottees, to determine whether, under the circumstances, restricted land ought to pass according to the terms of a will or according to the laws of intestacy. In holding that Section 1 of the Act gives the Secretary nonreviewable discretion to determine the legal heirs to restricted estates, *First Moon* v. *White Tail, supra,* this Court has already recognized that constitutional standards do not require judicial review of the Secretary's decisions concerning the disposition of these lands. See also *United States* v. *Bowling,* 256 U.S. 484, 487.

Nor, finally, is there merit to petitioners' assertion that even if the Act of 1910 precludes review under the Administrative Procedure Act, the district court properly invoked mandamus jurisdiction in this case under 28 U.S.C. 1361. As this Court has frequently held, the mandamus remedy is available only where

an officer has failed to perform a ministerial duty; it is not employed to "direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either." *Wilbur* v. *United States,* 281 U.S. 206, 218. See also, *Lane* v. *Mickadiet,* 241 U.S. 201, 208, 209; *Knight* v. *Lane,* 228 U.S. 6, 13; *Prairie Band of Pottawatomie Tribe of Indians* v. *Udall,* 355 F. 2d 364, 367 (C.A. 10); cf. *Noble* v. *Union River Logging Railroad,* 147 U.S. 165, 171–172.

As this Court said in *Wilbur* (281 U.S. at 218–219):

> The duties of executive officers, such as the Secretary of the Interior, usually are connected with the administration of statutes which must be read and in a sense construed to ascertain what is required. But it does not follow that these administrative duties all involve judgment or discretion of the character intended by the rule just stated. Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary. But where the duty is not thus plainly prescribed but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus. [Footnotes omitted.]

II. EVEN IF THE ACT HAD NOT PRECLUDED REVIEW OF THE SECRETARY'S DETERMINATIONS, THE REFUSAL TO APPROVE THE WILL IN THIS CASE COULD NOT BE REVERSED BECAUSE THE SECRETARY PROPERLY TOOK EQUITABLE CONSIDERATIONS INTO ACCOUNT IN REACHING HIS DECISION

Even if this Court were to adopt the position of the District of Columbia Circuit, that Section 2 of the Act does not preclude judicial review of the approval or disapproval of a will, the scope of review would be limited to those cases in which the Secretary exceeded the limits of the discretion conferred upon him by the Congress. As the District of Columbia Circuit said in *Homovich,* "[I]f upon such review it appears that [the Secretary's] action was within the scope of the authority conferred upon him, the court cannot disturb his decision." 191 F. 2d at p. 764.

Petitioners contend that the Secretary exceeded his authority in this case by taking equitable considerations into account in reaching his decision. Petitioners do not dispute the fact, amply supported in the record, that the deceased had entirely neglected his daughter, respondent Dorita High Horse, and that approval of the deceased's will would have merely perpetuated the unjust treatment she had suffered. However, petitioners argue that the statute limits the Secretary to passing on those technical questions concerning the validity of the will that would be considered by a probate judge.

This position is untenable. Nothing in the language of Section 2, which provides that no will disposing of restricted Indian property "shall be valid or have

ny force or effect unless and until it shall have been pproved by the Secretary of the Interior," suggests hat the Secretary must disregard equitable consider-tions. Indeed, the very nature of the Secretary's role n the allotment system, under which he serves as rustee for restricted Indian allotments,[1] charges him rith the responsibility of determining whether any Indian testator has dealt fairly with his family and dependents. The courts have long recognized the Secretary's special fiduciary role with respect to the disposition of restricted allotments. See *Blanset* v. *Cardin, supra.* As Chief Justice Burger, then Circuit Judge, said in *Udall* v. *Littell,* 366 F. 2d 668, 675, n. 24 (C.A. D.C.), certiorari denied, 385 U.S. 1007, "Indian wards, like individual wards, may often require the intervention of the guardian to prevent unwise action or dissipation of assets."

Examination of the legislative history of the specific provisions under consideration here makes it clear that Congress intended for the Secretary to focus on whether a will equitably dispose of restricted property. We refer again to part of the Congressional debate relied upon by this Court in the *First Moon* case, *supra.*

> Mr. BURKE of South Dakota. I will say the purpose was this: It frequently happened—and I will speak of that in connection with sections

[1] The fiduciary nature of this role is firmly established. *United States* v. *Hellard*, 322 U.S. 363, 367; *Morrison* v. *Work*, 266 U.S. 481, 485; *United States* v. *Sandoval*, 231 U.S. 28, 46; *Choctaw Nation* v. *United States*, 119 U.S. 1, 27; *Armstrong* v. *United States*, 306 F. 2d 520, 522 (C.A. 10); *Skokomish Indian Tribe* v. *France*, 269 F. 2d 555, 560 (C.A. 9); *Rainbow* v. *Young*, 161 Fed. 835, 838 (C.A. 8).

> 3 and 4 at the same time—it frequently happened an Indian has three or four children. He was allotted land at the time he had only two children, and the father and the mother have allotments and the two children who were living at the time allotments were made have allotments, but the other children have no land at all.
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> Now, the Indian is just as human as a white man, and it frequently happens that he desires to have permission to give his allotment to the children who have no land, and in a case of that kind undoubtedly the Interior Department would O.K. it, whereas if it was a will giving his estate to some person who ought not to have it, then they would disapprove it.
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> Mr. Cox of Indiana. Or else revoke the will if he did not make a proper will.
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> Mr. BURKE of South Dakota. If the Indian makes a will, and it is not satisfactory to the commissioner and the Secretary, and I put both in to safeguard it, it will be disapproved of, and of course will be of no effect. [Emphasis supplied.]

The weakness of petitioners' argument that the Secretary exceeded his authority by taking into account equitable considerations is apparent from the fact that it is supported mainly by examples of cases in which the Secretary approved wills which arguably disposed of allotted property in an equitable manner. See Peti-

tioners' brief, pp. 20–26. The short answer to petitioners' use of these cases is that it appears that the Secretary considered the equitable factors but decided either that they required approval of the will or at least that they did not justify disapproval. See, *e.g.*, *Estate of Wook-Kah-Nah*, 65 I.D. 436, affirmed *sub nom. Asenap* v. *Huff*, 312 F. 2d 358 (C.A.D.C.).

The government's role as the special guardian of Indians who live on reservations or who own restricted lands is an unusual one and has a largely historical basis. In the light of this history, Congress alone has the right to determine the extent to which the country's guardianship of Indians shall continue. *United States* v. *Sandoval*, 231 U.S. 28, 46; *United States* v. *McGowan*, 302 U.S. 535, 538. There is no basis for establishing, through judicial action, greater Indian autonomy, in piecemeal fashion, by denying the Secretary's statutory right to approve or disapprove an Indian will on equitable grounds.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted.

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